IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27243-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
STEPHEN ANTHONY FRAGOZA,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Schultheis, C.J. — Stephen Fragoza appeals his conviction for possession of more than 40 grams of marijuana. He contends the evidence is insufficient to support the conviction because the State failed to establish that he was in joint constructive possession of the marijuana. He also asserts the State inaccurately weighed the marijuana. We affirm.

FACTS

The facts are essentially undisputed. On October 29, 2007, at about 1:00 a.m., Sergeant Stacy Flynn, from the Adams County Sheriff's Office, and Officer Aaron Madison, from the Ritzville Police Department, stopped a car for speeding. As they

approached the car both officers could smell a strong odor of fresh marijuana emanating from the front windows, which were open. Isaac Hurt sat in the driver's seat and Mr. Fragoza sat in the front passenger seat. Sergeant Flynn told Mr. Hurt that the smell of marijuana was coming from the car and asked Mr. Hurt where the marijuana was located. Mr. Hurt stated that he and Mr. Fragoza had just smoked all of the marijuana in the car. The officer responded that he smelled fresh, not burned, marijuana. In response, Mr. Fragoza volunteered, "'it's right here,'" and started to reach toward the front passenger door compartment area. Clerk's Papers (CP) at 100. Officer Madison opened the front passenger door and found a glass pipe and a small bag of marijuana in the door's compartment. Mr. Hurt and Mr. Fragoza were arrested.

During a search of the front passenger area of the car, Officer Madison found four baggies of marijuana on the floor between the front passenger seat and the door. The next day, officers performed a more thorough search of the car and found a large bag of marijuana in the back seat under various personal items. Mr. Fragoza was charged with possession of over 40 grams of marijuana.

At the bench trial, Sergeant Flynn testified that Mr. Hurt's father was the registered owner of the car. The sergeant also testified that when Mr. Fragoza was questioned about the marijuana after his arrest, Mr. Fragoza said it was for personal use. During cross-examination, the sergeant conceded that Mr. Fragoza did not specify which

bag of marijuana he was referencing. Sergeant Flynn also stated that the large bag of marijuana had been found in the back seat directly behind the front passenger seat.

Officer Madison testified that the four baggies of marijuana were within a foot of Mr. Fragoza's hand and "[w]ell within reaching distance." Report of Proceedings at 103. The officer also testified that Mr. Fragoza stated that he and Mr. Hurt had been driving from California since 11:00 a.m. on October 28.

Sergeant Brian Taylor, a marijuana leaf identification technician, testified that the first bag of marijuana contained 6.2 grams of marijuana, the four baggies of marijuana contained 41.4 grams of marijuana, and the bag of marijuana from the back seat contained 256.9 grams of marijuana. During cross-examination, Sergeant Taylor stated that he did not weigh the stems separately.

Mr. Fragoza was convicted of unlawful possession of over 40 grams of marijuana. The trial judge's findings are detailed below. Mr. Fragoza appeals.

ANALYSIS

Mr. Fragoza argues that the State did not present sufficient evidence to establish that he possessed over 40 grams of marijuana. He concedes possession of the initial baggie of 6.2 grams of marijuana. However, Mr. Fragoza argues there is no evidence that he was aware of the remaining marijuana in the car and that his proximity to the marijuana is insufficient to establish that he had joint constructive possession. Relying

on *State v. Harris*, 14 Wn. App. 414, 542 P.2d 122 (1975), he argues that the State failed to prove that he had an "equal right of control" over the car. Appellant's Br. at 7. He also argues that "the doctrine of joint constructive possession violates the constitutional requirement of individualized suspicion." *Id*. at 10. Finally, he argues that the marijuana was inaccurately weighed.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992).

To prove possession of a controlled substance, "the State must establish two elements: the nature of the substance and the fact of possession by the defendant." *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Possession of an illegal substance may be either actual or constructive. *Id.* "Constructive possession is proved when the

person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found." *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971) (citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969)). A car may be considered a "premises." *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969). Determining whether there is constructive possession requires that we examine the totality of the situation. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Possession of a controlled substance may be joint. *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968).

The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). "Whether a passenger's occupancy of a particular part of an automobile would constitute dominion and control of either the drugs or the area in which they are found would depend upon the particular facts in each case." *Mathews*, 4 Wn. App. at 656. It is well settled that mere proximity to an illegal substance is not sufficient to support a conviction for constructive possession. *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990).

The trial court's unchallenged findings of fact adequately support its conclusion that Mr. Fragoza had joint constructive possession of the marijuana. The court found that (1) Mr. Fragoza and Mr. Hurt had been smoking marijuana just before they were stopped and it was reasonable to infer that they rolled the windows down when they noticed the

officers, (2) the officers could smell fresh marijuana, (3) the car windows were open even though it was a cold night, (4) both men were aware that there was marijuana in the car, (5) Mr. Fragoza and Mr. Hurt both smelled the marijuana in the car because the officers were able to smell it from the open windows before they even made contact, (6) the five bags of marijuana were all located closer to Mr. Fragoza than Mr. Hurt, and (7) Mr. Fragoza admitted that he knew marijuana was in the vehicle, and it is reasonable to infer that Mr. Fragoza "made a show of cooperating with the officers in the hope that that would end their inquiry, knowing full well that the amount of marijuana that was initially seized weighed much less than forty grams." CP at 102.

We reject Mr. Fragoza's argument that *Harris* requires reversal for insufficient evidence of joint constructive possession. In *Harris*, a husband and wife were convicted for possession of marijuana found in the locked trunk of a car owned and driven by Robert Harris. *Harris*, 14 Wn. App. at 417. On the date of their arrest, Mr. Harris's wife had been a passenger in the car. Division Two of this court reversed the wife's conviction, noting that she had been "completely separated from the locked trunk." *Id*. at 418. The court also noted that the only evidence of the wife's dominion and control of the marijuana consisted of the fact that she had been a passenger in Mr. Harris's car and an officer's testimony that he obtained the keys to the trunk from "'either Mr. or Mrs. Harris.'" *Id.* at 417.

Our case is distinguishable. The drugs in *Harris* were "completely separated" from the passenger. Here, in contrast, the four baggies of marijuana were within arm's reach of Mr. Fragoza and the larger bag was located directly behind Mr. Fragoza on the back seat. Furthermore, Mr. Fragoza had been in the car for many hours—a car that reeked of fresh marijuana and in which he had used marijuana. Under these circumstances, the trial court could reasonably conclude that Mr. Fragoza was in joint constructive possession of the marijuana.

Relying on *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008), Mr. Fragoza next argues that the doctrine of joint constructive possession violates the constitutional requirement of individualized suspicion. He specifically challenges "the lack of individualized suspicion beyond the baggie located in the passenger door compartment." Appellant's Br. at 10.

However, *Grande* is not applicable here. The issue in that case was "whether the moderate smell of marijuana emanating from a vehicle, without more, establishes probable cause to arrest all occupants of the vehicle and conduct a search incident to arrest." *Grande*, 164 Wn.2d at 138. The Washington Supreme Court held that our constitution requires individualized probable cause for each occupant of the vehicle. *Id*. at 143.

Mr. Fragoza is not challenging his arrest or the search of the car. His individual

privacy rights are not at issue here. Our inquiry is confined to whether substantial evidence supports the court's conclusion that Mr. Fragoza had joint constructive possession of the marijuana found in the car. In view of the law on this issue and the court's unchallenged findings, the evidence sufficiently establishes that Mr. Fragoza constructively possessed the marijuana in the car.

The final issue is whether the marijuana was correctly weighed. Pointing out that the statutory definition of marijuana explicitly excludes "stems," Mr. Fragoza argues that the presence of stems in the marijuana introduced into evidence renders any weight determination invalid. Although Mr. Fragoza did not raise this issue below, we will address it because the State has the burden to prove that the marijuana weighed over 40 grams. Challenges to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

RCW 69.50.101(q) defines marijuana as:

> [A]ll parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include *the mature stalks* of the plant.

(Emphasis added.)

Mr. Fragoza's argument fails because there is no evidence that the marijuana contained the "stalks" of marijuana plants, mature or otherwise.[1] The statute does not

[1] Marijuana stalks and stems appear to be different parts of the marijuana plant.

exclude stems and Mr. Fragoza provides no authority for his proposition that stems (as opposed to stalks) are excluded from the statutory definition. Had the legislature intended to exclude stems from the definition of marijuana, it would have done so. *See Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977) ("Where a statute provides for a stated exception, no other exceptions will be assumed by implication.").

CONCLUSION

We conclude that sufficient evidence supports Mr. Fragoza's conviction for possession of over 40 grams of marijuana. Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

_____
Kulik, J.

See Hill v. Commonwealth, 17 Va. App. 480, 483, 438 S.E.2d 296 (1993) (separately listing marijuana leaves, marijuana stems, a marijuana stalk, and seeds).

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Korsmo, J.